IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.1003/2002

Reserved on.27.4.2007

Decided on. 1.6.2007

Pavilion Resorts Private Ltd. & Anr. …Petitioners.

Versus

Municipal Council, Dalhousie & another. …Respondents

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*. Yes*

For the petitioners : **Mr.Dushyant Dadwal, Advocate**

For the respondent No.1 **Mr. Neeraj Kumar Sharma, Advocate.**

For the respondent No.2 **Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakashi Sharma, Deputy Advocates General.**

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner-company had submitted application for permission for change of land use/development. The respondent No.2 sent a communication to the petitioner on 13.6.2000 bringing to its notice that the planning permission case had been examined. The petitioner was requested to keep the following observations in mind while resubmitting the plan:

1. **"The position of Trees may be marked on the site plan.**
2. **The provision of waste water storage tank should be kept at site.**
3. **Fourth story is not allowed, only three storeys with C.G.I. sheets roofing is allowed.**

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? Yes.

4. **No. of vehicles for car parking be mentioned.”**

In sequel to letter dated 13.6.2000, the petitioner has sent the reply to the same on 7th July, 2000 and in the meanwhile when the case was under process vide notification dated 11.8.2000, a ban on planning permission was imposed by the State. The intimation to this effect was sent to the petitioner-company on 3.10.2000. The ban on planning permission was further extended upto 31.3.2001 by the Government on 19th December, 2000. The Government had issued notification on 24th January, 2001 for regulating the construction in Nagar Parishad, Dalhousie area for forming part of Dalhousie Planning Area. The copy of notification is at page 56 of the paper book. The petitioner-company was informed vide communication dated 29.5.2001 by the respondent No.2 to collect his papers from the office to re-submit the case as the ban period was over. The petitioner-company has sent a letter to the respondent No.2 on 5.10.2001 bringing to its notice that a letter dated 18.9.2000 was sent under section 31 (5) of the H.P. Town and Country Planning Act, 1977. Thereafter the case was filed with the Municipal Council, Dalhousie on 7.6.2001. The Executive Officer of the Municipal Council, Dalhousie had directed the petitioner-company on 24th April, 2001 to get the land use permission from the Town and Country Planning Department and thereafter submit the same to the Council. The petitioner-company by way of letter dated 5.10.2001 had sought clarification from respondent No.2 whether a fresh permission was required with regard to applicability of section 31 (5) of the Town and Country Planning Act, 1977. It will be pertinent to note at this stage that the petitioner was also served with a notice under section 39 of the Town and Country Planning Act, 1977 on14.5.2001 by the Deputy Commissioner, Chamba.

Mr. Dushyant Dadwal, Advocate appearing on behalf of the petitioners has submitted that the petitioners’ case was squarely covered

under section 31 (5) of the Town and Country Planning Act, 1977 and in other words it was a case of deemed sanction.

Mr. M.S. Chandel, the learned Advocate General had strenuously contended that the case of the petitioner was not covered under section 31 (5) of the Town and Country Planning Act, 1977.

Mr. Neeraj Kumar Sharma, Advocate appearing on behalf of respondent No.1 has submitted that the petitioner was served with a notice on 16.4.2001 and finally the House of the Municipal Council vide its resolution No. 211 dated 20.9.2001 passed the demolition. Thereafter the notice was issued to the petitioner on 16.4.2001 and this notice was further confirmed vide resolution dated 20th September, 2001 copy of which is at page 81 of the paper book of this petition. The petitioner had submitted papers for planning permission on 25.5.2000. The Assistant Town Planner had raised certain observations on the same on 13th June, 2000 vide Annexure P-1. The petitioner had submitted reply to Annexure P-1 on 7.7.2000. Thereafter the ban was imposed by the State Government on 11.8.2000. The petitioner had submitted application i.e. Annexure PC on 18.9.2000 during the period when the ban was in force. The ban was extended from 11.8.2000 upto 31.3.2001 vide notification dated 19.12.2000. In the meantime the Town and Country Planning Department had issued notification dated 24th January, 2001 to regulate the construction in Nagar Parishad, Dalhousie area forming part of Dalhousie Planning Area. The petitioner was informed on 29.5.2001 to re-submit his case. The petitioner instead of submitting the documents to the Town and Country Planning it appears had submitted the documents to the respondent No.2-Council on 6.6.2001 which was returned by the Executive Officer on 24th July, 2001 with the observations that the fresh land use permission be sought from the Town and Country Planning

Department. The petitioners had sent a communication to the respondent No.2 on 5.10.2001 seeking clarification whether the company could seek the protection under section 31 (5) of the H.P. Town and Country Planning Act, 1977 or not.

Admittedly the petitioner had been informed on 13th June, 2001 to remove the objections made therein. The petitioner had removed the objections on 7th July, 2000. The notice under section 31 (5) of the H.P. Town and Country Planning Act, 1977 has been sent on 18th September, 2000 but before the issuance of notice under section 31 (5) of the H.P. Town and Country Planning Act, 1977, the State had imposed a ban on 11th August, 2000, which was further extended on 19th December, 2000 with effect from 11th August, 2000 upto 31st March, 2001. Immediately after the lifting of the ban, the representative of the petitioner-company had collected the documents on 14th May, 2001 to re-submit the same in conformity with notification dated 24th January, 2001. It was incumbent upon the petitioner to comply with the notification dated 24th January, 2001 instead of seeking clarification on the basis of letter dated 5.10.2001. The petitioner-company had submitted building plan for approval to the Municipal Council on 6th June, 2001 by mentioning therein that since it had not received any information from the office of Assistant Town Planner, Chamba refusing permission it will be a case of deemed sanction under section 31 (5) of the H.P. Town and Country Planning Act, 1977. The Council had rightly informed the petitioner-company on 24th July, 2001 to get the land use permission from the Town and Country Planning Department due to subsequent developments. The subsequent developments which have taken place after the submission of the building plan of the petitioner could be summarized as under:

1. **The ban was imposed by the State on 11th August, 2000 which was further extended 19th December, 2000. The new regulations have come into force on 24th January, 2001.**
2. **The petitioner had been informed to re-submit the drawings by the Assistant Town Planner, Town and Country Planning Department vide letter dated 29.5.2001. The petitioner had not resubmitted application for change of land use.**
3. **The petitioner had been issued notice under section 39 of the H.P. Town and Country Planning Act, 1977 on 4th May, 2001 by the Deputy Commissioner.**
4. **The petitioner had been served with a notice on 16.4.2001 by the respondent-Council. The Council has passed the resolution on 20th September, 2001 for issuing demolition order against the petitioner-company.**
5. **The petitioner had been issued notice by the Executive Officer on 6.10.2001.**

It will be apt to reproduce section 31 (5) of the H.P. Town and Country Planning Act, 1977 for better appreciation of the submissions made by the learned counsel for the parties:

> **31 (5) If the Director does not communicate his decision whether to grant or refuse permission to the applicant within six months from the date of receipts of his application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of six months.**

The petitioner had been directed by the Assistant Town and Country Planning on 13th June, 2000 to remove the deficiencies and the application seeking benefit of section 31 (5) of the H.P. Town and Country Planning Act, 1977 was moved on 18th September, 2000. Thus, the petitioner could not invoke the benefit of provisions of section 31 (5) of the H.P. Town and Country Planning Act, 1977 more particularly the petitioner had submitted the application when the ban was imposed by the State on 11th August, 2000 which remained enforced up to 31.3.2001. During this

period the petitioner had raised unauthorized construction as such neither the resolution passed by the Council nor the demolition order dated 6.10.2001 could be faulted with. The petitioner admittedly had raised the construction without prior approval either from the Town and Country Planning Department or from the Municipal Council, Dalhousie. The question under what circumstances a person can get benefit of "deemed sanction" has been dealt with by the Hon'ble Supreme Court in Civil Appeal No. 2525 of 2007 titled as ***Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and others*** decided on 15.5.2007. Their Lordships of the Hon'ble Supreme Court have held as under:

> **"It is now well-settled that where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned. The law operating in this behalf, in our opinion is no longer res integra.**
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> **In Director of Public Works v. Ho Po Sang [1961 AC 901 : (1961) 2 All ER 721], the Privy Council considered the said question having regard to the repealing provisions of the Landlord and Tenant Ordinance, 1947 as amended on 9-4-1957. It was held that having regard to the repeal of Sections 3-A to 3-E, when applications remained pending, no accrued or vested right was derived. It was observed therein :**
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> > **"In summary, the application of the second appellant for a rebuilding certificate conferred no right on him which was preserved after the repeal of Sections 3-A to 3-E, but merely conferred hope or expectation that the Governor-in-Council would exercise his executive or ministerial discretion in his favour and the first appellant would thereafter issue a certificate. Similarly, the issue by the first appellant of notice of intention to grant a rebuilding certificate conferred no right on the second appellant which was preserved after the repeal, but**

merely instituted a procedure whereby the matter could be referred to the Governor-in-Council. The repeal disentitled the first appellant from thereafter issuing any rebuilding certificate where the matter had been referred by petition to the Governor-in-Council but had not been determined by the Governor." [See also Lakshmi Amma v. Devassy [1970 KLT 204]

The question again came up for consideration in Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others [(2004) 1 SCC 663], wherein this Court categorically held :

"The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to ownership or possession of any property for which the expression vest is generally used. What we can understand from the claim of a vested right set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a legitimate or settled expectation to obtain the sanction. In our considered opinion, such settled expectation, if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such settled expectation has been rendered impossible of fulfilment due to change in law. The claim based on the alleged vested right or settled expectation cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by

> **the Corporation against whom such vested right or settled expectation is being sought to be enforced. The vested right or settled expectation has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a settled expectation or the so-called vested right cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."**

In Union of India and Others v. Indian Charge Chrome and Another [(1999) 7 SCC 314], yet again this Court emphasized:

> **"The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration"**

In S.B. International Ltd. v. Asstt. Director General of Foreign Trade [(1996) 2 SCC 439], this Court repelled a contention that the authorities cannot take advantage of their own wrong viz. delay in issuing the advance licence, stating :

> **"We have mentioned hereinbefore that issuance of these licences is not a formality nor a mere ministerial function but that it requires due verification and formation of satisfaction as to compliance with all the relevant provisions."**

There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the

same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant necessary clarification and/or compliance of the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision.

Furthermore, since special regulations have been framed in the town of Shimla, the core area as provided for in the regulation is required to be protected. The area in question has been declared to be a heritage zone, and hence no permission to raise any construction can be issued, which would violate the ecology. Such regulations have been framed in public interest. Public interest, as is well-known, must override the private interest. [See Friends Colony Development Committee v. State of Orissa and Others AIR 2005 SC 1 para 22].

The Hon'ble Supreme Court in ***Raipur Development Authority Vs. Anupam Sahkari Griha Nirman Samiti and others*** (2004) 4 SCC 357 had considered the provisions of sub section 5 of section 30 of the Madhya Pradesh Town and Country Planning Development Act, 1973, and have held as under:

"The first contention raised for the appellant is, whether on the facts and circumstances of this case, in view of sub section (5) of Section 30 of the Act, it could be said it to be a case of deemed permission. For read referenced section 30 is quoted hereunder:

"30. Grant or refusal of permission. – (1) On receipt of an application under section 29 the Director may, subject to the provisions of this Act, by order in writing-

(a) grant the permission unconditionally;

(b) grant the permission, subject to such conditions, as may be deemed necessary under the circumstances;

(c) refuse the permission.

(2) Every order granting permission subject to conditions, or refusing permission shall state the grounds for imposing such conditions or for such refusal.

(3) Any permission granted under sub-section (2) with or without conditions shall be in such manner as may be prescribed.

(4) Every order under sub section (2) shall be communicated to the applicant in such manner as may be prescribed.

(5) If the Director does not communicate his decision whether to grant or refuse to the applicant permission within sixty days from the date of receipt of his application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of sixty days:

Provided that in computing the period of sixty days the period in between the date of requisitioning any further information or documents from the applicant and the date of receipt of such information or documents from the applicant shall be excluded."

Under sub-section (5), if the Director does not communicate his decision either granting unconditionally or conditionally or refusing the permission then within 60 days from the date of the receipt of such application, the permission would be deemed to have been granted. But significantly the proviso to its extends this period by excluding the period during which any further information or document is requisitioned from the applicant to the date of its receipt. It is not in dispute that respondent 1 applied for the development of the land under section 29 on 2.6.1986. The 60 days expire on 2.8.1986. The respondent's case is till this date the Director has neither refused nor granted the permission hence it would be deemed to have been granted. On the other hand, the appellant strongly relies on the five communications sent by the Joint Director, Town and Country Planning, to respondent 1 seeking certain information with regard to the development permission which was not forthcoming, for this reason, the case of the respondent was closed, which is evidenced from the letter dated 6.10.1986. Thus the question of deemed permission would not arise in view of the said proviso. This letter refers

to the said five earlier communications, namely, letters dated 18.6.1986, 1.7.1986, 21.7.1986, 31.7.1986 and 9.9.1986. The letter records:

> **"Refer to the above letters with reference to the above subject. The information asked from you is still not received. Therefore the case is closed and filed."**

Thus for full more than four months, since making of the said application the information was not forthcoming.

The contents of this letter clearly reveal that the case of respondent 1 was ordered to be closed and filed. This letter reveals that the period of sixty days had not come to an end, in view of the said proviso as information was not sent as asked for. So the question of deemed permission would not arise. Then further it constitutes to be a case of rejection of its application. This letter was communicated to respondent 1. He did not file any appeal or revision as contemplated under section 31 and 32 of the said Act. Thus we have no hesitation to hold that the High Court committed error in recording the finding that it is a case of deemed permission."

In the present case the petitioner had been informed vide Annexure PA dated 13.6.2000 to remove the deficiencies, which were removed in the month of July, 2000 and the period prescribed under sub section 5 of section 31 is six months with proviso to the effect that in computing the period of six months the period in between the date of requisitioning any further information of documents from the applicant and date of receipt of such information or documents from the applicant shall be excluded. In this case the petitioner had been called upon to furnish the information vide Annexure PA dated 13.6.2000 which was supplied vide Annexure PB on 7.7.2000. Thus, the petitioner could not take benefit of the communication dated 7.7.2000 against a deemed sanction. The petitioner himself was also not sure whether he can invoke the benefit of section 31 (5) of the H.P. Town and Country Planning Act, 1977 as is evident from the letter dated 5.10.2000. The petitioner has sought clarification from the

Assistant Town Planner whether he could get benefit under section 31 (5) of the H.P. Town and Country Planning Act, 1977 or not.

The petitioner was required to re-submit the plans in accordance with the notification dated 24th January, 2001. The petitioner had not submitted the same to the competent authority and any construction raised by him thus is to be treated unauthorized construction.

The upshot of the above discussion is that the action of the respondents is valid and the petitioner had to submit the building plans after coming into force the notification dated 24th January, 2001.

Accordingly the writ petition is dismissed with no order as to costs.

(Rajiv Sharma), Judge

June 1, 2007
Awasthi